United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2152

United States Court of Appeals
For the Second Circuit

ROBERT HOKE,
Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal From The United States District Court For The Southern District Of New York

BRIEF FOR APPELLANT

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United States Court of Appeals
For the Second Circuit

Docket No. 76-2152

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ROBERT HOKE

Appellant

v.

UNITED STATES OF AMERICA

Appellee

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BRIEF FOR APPELLANT

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STATEMENT OF ISSUE

Whether Appellant Robert Hoke was prejudiced by counsel's conflict of interest when he was represented with his co-defendants by one law firm during joint Narcotic Conspiracy trial.

Whether Appelant Robert Hoke waived his constitutional rights to receive aggressive and effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.

STATEMENT OF CASE

A three count indictment 72 Cr. 1159 was filed against Appellant Robert Hoke, Willie Abraham, Erroll Holder, Walter Grant and fourteen other defendants on October 16, 1972, in the Southern District of New York charging them with violation of the narcotics law. Count one of indictment 72 Cr. 1159 charged Appellant Hoke with conspiracy to distribute narcotics 21 USC 846. Appellant Hoke and the co-defendants proceeded to trial on January 16, 1973 before the Honorable Frederick Van Pelt Bryan of the United States District Court. The trial concluded on February 23, 1973, and Appellant Hoke was thereafter convicted with nine other defendants in this case. Judge Bryan ultimately reduced the original sentence of fifteen (15) years on Count One of the indictment 72 Cr. 1159 and gave Appellant Hoke an aggregate sentence of ten (10) years imprisonment with a special parole of four (4) years. On May 10, 1974, this Court affirmed the judgment of conviction, see United States v. Sisca, 503 F2d 1137 (2d Cir.) 1974, and the United States Supreme Court thereafter denied a petition for a writ of Certiorari on November 11, 1974. Subsequent thereto, Appellant Hoke proceeded pursuant to 28 U.S.C. Section 2255 for an Order to vacate the sentence heretofore imposed and for a new trial on the ground that he was denied effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution. On May 25, 1976, United States District Judge Dudley B. Bonsal conducted an evidentiary hearing on

the 2255 Motion. After the hearing, Judge Bonsal issued a memorandum opinion on September 15, 1976 denying Appellant Hoke's Motion to vacate his sentence in 72 Cr. 1159. The instant appeal to this Court followed.

ARGUMENT
POINT 1

APPELLANT ROBERT HOKE WAS DENIED AGGRESSIVE AND EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION WHEN THE COURT BELOW PERMITTED HIM AS WELL AS OTHER DEFENDANTS TO BE REPRESENTED BY A SINGLE LAW FIRM.

At trial, Appellant Robert Hoke, Alphonse Sisca, Willie Abraham, Erroll Holder, Walter Grant and Margaret Logan were represented by the single law firm of Lenefsky, Gallina, Mass, Berne and Hoffman (hereinafter referred to as the Gallina firm). On November 17, 1972, the Assistant United States Attorney in charge of the prosecution, W. Cullen McDonald, Esq., filed an affidavit and memorandum of law seeking to resolve the conflict of interest question which had arisen by virtue of the joint representation of the six defendants in the narcotics conspiracy trial by the Gallina firm. At this time, there was no independent or outside counsel involved with any of the six defendants. Appellant Hoke was being represented by Robert Keernan, Esq., an associate of the Gallina firm. In an attempt to resolve the conflict question, the court held a pre-trial hearing and made a determination thereafter that the defendants could continue to be represented by the Gallina firm.

In Glasser v. United States, 315 U.S. 60 S. Ct. 457, 86 LEd 680 (1942), the Supreme Court stressed the importance of representation free

from conflicting interests as part of the basic Sixth Amendment right to the assistance of counsel in criminal defense, and cautioned that waiver of this right was not likely to be found. The Court in Glasser went on to stress that serious problems are avoided by having representation by separate counsel in criminal cases involving more than one defendant. This honorable Court stated in Morgan v. United States[1], 396 F2d 110, 114 (2d Cir. 1968):

> "the effective assistance of counsel is so important and paramount a right for a defendant on trial for a serious crime that we are not entitled to assume, merely because there is such substantial support for the conviction, that the defendant was in fact, adequately represented by counsel."

In Morgan the defendants were convicted of violating the Mann Act. Before trial, counsel for defendant Morgan withdrew from the case and the trial judge appointed the attorney for defendant Stein to also represent defendant Morgan. Thereafter, a conflict arose between the defendants. After conviction, defendant Morgan filed a Section 2255 proceeding, alleging a denial of his Sixth Amendment rights. In remanding this court stated:

> "Despite what the appearance may be before trial, the possibility of a conflict of interest between two defendants is almost always present to some degree even if it be only in such a minor matter as the manner in which their defense is presented."

The Court here suggested that where a potential conflict of interest might arise from joint representation, the trial Court should determine through "careful inquiry" whether prejudice will result from the joint representation. In this Circuit this Court has heretofore required that same "specific instance of prejudice, some real conflict of interest, resulting from

joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel." United States v. Carrigan, Docket Nos. 74-2056, 74-2057 (2d Cir., Nov. 3, 1976). See United States v. Mari, 526 F2d 117 (2d Cir. 1975); United States v. Badalamente, 507 F2d 12, 20-21 (2d Cir. 1974); United States v. Lovano, 420 F2d 769, 773 (2d Cir), Cert. denied 397 U.S. 1071. Manifestly, the conflict of interest between the defendants was not apparent, but real in this case.

The prejudice which followed from this joint representation substantially damaged the legal position of Appellant Hoke. Such a showing of prejudice is apparent on the face of the record. The Gallina firm neglected to file pre-trial Minimization Motions for Appellant Hoke to suppress certain wire tap evidence. The failure to file such motion was obviously for the sole reason that the wire tap evidence did not seriously implicate defendant Sisca, the alleged leader of the conspiracy. Hence, prejudice was the direct result of the joint representation which constituted a violation of Appellant Hoke's Sixth Amendment right of the United States Constitution. It is true that Appellant Hoke was acquitted on the use of the telephone count but had a timely Minimization Motion to suppress the wire tap evidence been successful the government's case would have weakened. The success of such a Motion may have resulted in a different outcome for Appellant Hoke as well as the other defendants. The conflict between Appellant Hoke and defendant Sisca was indeed real which violated Appellant Hoke's Sixth Amendment right to have aggressive and effective assistance of counsel. The failure by the

Gallina firm to timely move to suppress the wire tap evidence is a specific showing of prejudice which requires reversal of the Order denying Appellant Motion pursuant to 28 U.S.C. Sec. 2255. United States ex rel. Bart v. Davenport 478 F2d 203 (3d Cir. 1973), United States v. Lovano 420 F 2d 769, 773 (2d Cir) Cert. denied 397 U.S. 1071.

It is also interesting to note that when the government called John Pollock, Esq., an associate of the Gallina firm as a witness, he testified that he wanted a meeting to discuss:

> "... the issue of conflict of interest, because I felt very strongly at that time that there was in fact a conflict of interest ....
>
> "And it was my opinion that there were particularly strong conflicts of interest between Mr. Abraham and Mr. Hoke ...
>
> "And I also felt that it was wrong for the law firm to represent six defendants (TR. 11 78 80)

By virtue of the joint and multiple representation in this case, one can hardly disagree with Mr. Pollock's statement. The conflict between Appellant Hoke and Willie Abraham was indeed substantial. Willie Abraham according to the evidence, was more seriously involved than Appellant Hoke. It is obvious that trial tactics with respect to cross examination and the taking of testimony would of necessity be given different consideration. Again, the prejudice to Appellant Robert Hoke was real and not apparent. The record in the present case reveals that Judge Bryan conducted a hearing to resolve the conflict of interest question. The Court concluded that each defendant had made a deliberate election of the Gallina firm in conformity with the holding

of United States v. Sheiner, 410 F2d 337 (2d Cir.), Cert. denied 396 U.S. 825 (1969). Tr. 11/22/72 at 41). Upon close scrutiny it is crystal clear that Sheiner is distinguishable. Firstly, unlike Appellant Hoke here, Sheiner was advised by the trial judge as to how his position would conflict with that of his co-defendant. Secondly, Sheiner had the opportunity to consult with independent outside counsel on the conflict question. Such was not the case here. Appellant Hoke never had outside counsel.

> "On the contrary, from the very outset both the court and government evidenced a keen sensitivity to the subject and repeatedly sought to ferret out from the defendants and their retained common counsel whether there were facts or separate defenses indicating the necessity for separate representation."
>
> 478 F. 2d at 281

While the procedure employed by the trial court in Wisniewski was quite similar to that of the instant case, the obvious difference between the cases is, again, the inquiry as to whether the defendants were aware of the facts. While the trial judge here explained a conflict of interest in general terms and inquired whether Mr. Hoke's choice was made freely, not the slightest effort was made to determine if the defendant, Hoke, understood factually how a conflict might arise.

Following Wisniewsky, in United States vs. DeBerry, 487 F. 2d 448 (2d Cir. 1973), the court adopted a significant new rule in Sixth Amendment conflict of interest cases. In DeBerry, two defendants, convicted of drug

offenses, who were represented by the same attorney appealed on the Sixth Amendment conflict ground. The court pointed out that, although counsel for the co-defendants assured the trial judge that he had explained the conflict issue to the defendants, this was insufficient inquiry. The court, citing United States vs. Foster, 469 F. 2d 1 (1st Cir. 1972), adopted the rule that, where the inquiry of the trial judge is insufficient, the burden on the question of prejudice is shifted to the government.

While the trial court in DeBerry apparently did not question the defendants at all, relying instead on the counsel's assurance, the fact that the trial judge did question the defendants here should not remove this case from the DeBerry rule. The effect of an inadequate inquiry is the same as that resulting from the no inquiry at all. United States v. Vowteras 500 F. 2d 1210 (2d Cir. 1974 Cert. denied, 419 U.S. 1069 (1975). Hence, the teaching of DeBerry is that the government here has the burden of proof of showing that no prejudice resulted to the Defendant Hoke from the joint representation of the Gallina firm.

The progression of Sixth Amendment conflict cases in the Second Circuit, which are relevant here, ends with United States vs. Vowteras, 500 F. 2d 1210 (2d Cir. 1974, cert. denied, 419 U.S. 1069 (1975). In the Vowteras case, the court clarified its position as to the role of the pre-trial hearing. It will be recalled that in Alberti, supra, the court indicated that the pre-trial hearing would serve to reduce the possibility

of the convictions being reversed on appeal. The mere fact that a pre-trial is held on the conflict issue will not necessarily be conclusive on the Sixth Amendment issue. Similarly, in Vowteras, the court stated that, since the defendants were fully advised of the underlying facts of the potential conflict, they could not, on appeal, repudiate their choice of counsel, absent specific showing of prejudice. The clear import of Alberti and Vowteras is that, even where the defendants are fully advised, a specific showing of prejudice can defeat the conviction. It seems, then, that the role of the pre-trial hearing is simply to mitigate the possibility of resulting prejudice. If prejudice is shown, a conviction may be reversed, notwithstanding a sufficient pre-trial hearing.

An overview of the Second Circuit cases results in the formulation of certain rules which pertain to Sixth Amendment conflict cases. First, the defendant must point to a specific prejudicial occurrence in order to prevail on appeal. A sufficient pre-trial hearing during which the defendant is fully advised of the facts underlying the potential conflict will bear heavily against a bona fide showing of prejudice. If a pre-trial hearing which amounts only to an insufficient inquiry is afforded, the burden of showing no prejudice will be on the government. United States v. Alberti, 470 F 2d 878 (2d Cir. 1972), Cert. denied, 411 U.S. 919.

POINT II

APPELLANT ROBERT HOKE DID NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE HIS RIGHT TO HAVE EFFECTIVE ASSISTANCE OF COUNSEL.

It is quite evident from the facts and circumstances of this case that Gino Gallina, Esq., as chief counsel for the defense used his influence to manipulate and maneuver the trial to the best interest of defendant Sisca to the detriment of Appellant Hoke and the other defendants. Moreover, the nature of the potential disability of joint representation was never fully explained to him. United States v. Sheiner, supra. Although the court held a pre-trial hearing to resolve the conflict question, the court did not on face of the record herein advised Appellant Hoke of the underlying conflict relative to each defendant's legal position. In connection herewith, it is interesting to note that during the pre-trial hearing on the conflict issue, not only did the court fail to explain the potential underlying conflict, but in addition, the Appellant Hoke had no opportunity to express himself on this serious question. At the very least, he as well as the other should have been advised to consult outside counsel. This court stated in United States v. Carrigan, Supra:

> "The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views."
>
> "The district judge should fully explain to Armendo and Gill the nature of the conflict, the disabilities which it may place on Kassner & Detsky (attorneys) in their conduct of Appellant's defense, and the nature of the potential claims which Appellants will be waiving should they choose to proceed with these attorneys."

United States v. Armedo-Sariento, 524 F. 2d 591 (2d Cir. 1975); United States v. Mari, 526 F. 2d 117 (2d Cir. 1975); United States v. Garcia, 517 F. 2d 272 (5th Cir. 1975).

The court below could have inquired of Appellant Hoke to explain his understanding of what Gino Gallina, Esq., had told him (Hoke) about the real and potential conflict of interest that would develop once he decided to remain with the Gallina firm. Without this kind of inquiry, there can be no knowing and intelligent waiver of so fundamental a right as that guaranteed by the Sixth Amendment of the federal Constitution to have the effective assistance of counsel at every critical stage during a serious criminal trial.

Finally, the Appellant Robert Hoke request of this honorable court that he be permitted to adopt the legal arguments in the brief which was filed in this appeal on behalf of Willie Abraham 76-2135, to the extent that such legal arguments are applicable.[1]

[1] This request is being made in agreement with Alan Palmer, Esq., attorney for Willie Abraham on this Appeal.

CONCLUSION

For the above stated reasons, the order denying Appellant Hoke's motion pursuant to 28 U.S.C., Sec. 2255 should be reversed, the judgment of conviction vacated, and the case remanded for a new trial.

Respectfully submitted,

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CHANCE

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of Dec. ,19 76 at No. 1 St. Andrews Pl., NYC

deponent servied the within (illegible)
upon U.S. Atty., So. Dist. of NY

the Appellee herein, by delivering true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
20 day of Dec. 1976.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978